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CHARLES ELMORE CRUPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 711

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND MOTION AS TO PRINT-
ING RECORD.

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C. MAURICE WEIDEMEYER,
Counsel for Petitioner.



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PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Creek Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on June 1, 1942.

Opinion Below.

The opinion of the Court of Claims is not as yet reported (R. 5-14).

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 (R. 14). Motion for a new trial filed in the proceed-

ings was overruled on October 5, 1942 (R. 15). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act approved May 24, 1924, c. 181, 43 Stat. 139, reads in part as follows.

“That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Creek Nation or Tribe may have against the United States, * * *

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

“That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the

terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended * * *."

Section 15 of the Act of June 28, 1898, c. 517, 30 Stat. 495, 500-501, reads in part as follows:

"That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property, other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or the town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.

"* * * And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot, said Secretary may fix the value thereof.

"The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; * * and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

* * * * *

"All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the

Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots."

The Original Creek Agreement, ratified by the Act of March 1, 1901, c. 676, 31 Stat. 861, 864-866, 871, provides in part as follows:

"10. All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised under the provisions of an Act of Congress entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for the other purposes,' approved May thirty-first, nineteen hundred, which said provisions are as follows:

" 'That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors,

• • •

• • • • •

" 'The Secretary of the Interior may in his discretion appoint a townsite commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the In-

terior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

“Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation a separate townsite commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled “An act for the protection of the people of the Indian Territory.”

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“As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisalment of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing Act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisalment and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as

may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

“The Secretary of the Interior may, for good cause, remove any member of any townsite commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

* * * * *

“Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time. Such townsites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other townsites: Provided further, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: Provided, That hereafter the Secretary of the Interior may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a townsite commissioner for any town or to fill any vacancy caused by the neglect or refusal of the townsite commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion appoint a commissioner to fill the vacancy thus created.’

"11. Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised value thereof, but if he shall fail within sixty days to purchase such lot and make the first payment thereon, as herein provided, the lot and improvement shall be sold at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the purchase price to the owner of the improvements, less the appraised value of the lot.

"12. Any person having the right of occupancy of a residence or business lot or both in any town, whether improved or not, and owing no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

"13. Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

"14. All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

"Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been divided at two-thirds of their appraised value.

"15. When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional and the remainder of the purchase money in three equal annual installments, without interest.

"Any person who may purchase an unimproved lot shall proceed to make payment for same in such time and manner as herein provided for the payment of sums due on improved lots, and if in any case any amount be not paid when due, it shall thereafter bear interest at the rate of ten per centum per annum until paid. The purchaser may in any case at any time make full payment for any town lot.

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"34. The United States shall pay all expenses incident to the survey, platting, and disposition of town lots, and of allotment of lands made under the provisions of this agreement, except where the town authorities have been or may be duly authorized to survey and plat their respective towns at the expense of such town."

Questions Presented.

The questions presented are as follows:

1. Whether the Creek Nation is entitled to recover from the United States for the failure of its administrative officers to appraise and dispose of the town lots within the domain of the Creek Nation at their "true value", as was required by the terms of the Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861.
2. Whether the Creek Nation need show fraud or gross mistake in order to recover; or whether petitioner need

show merely a violation by respondent of the terms of said Creek Agreement, which violation resulted in loss to the trust estate.

3. Whether the United States fell short of exacting fiduciary standards under the rule laid down in *The Seminole Nation v. United States*, 316 U. S. 286, 296-297, decided May 11, 1942, when its officers and agents arbitrarily appraised and disposed of Creek town lots without regard to their actual value, and otherwise failed to appraise said town lots at their "true value" in accordance with the terms of said Creek Agreement, which said low appraisals were approved by the Secretary of the Interior, with full knowledge, or ample means of knowledge, that said appraisals were extremely low.

4. Whether the townsite commissions appointed by respondent properly discharged their duties under the Creek Agreement, when it is shown that they grossly undervalued said Creek town lots, and arbitrarily appraised said lots with no regard to their "true value"; that the appraisals were in some instances less than one-third the actual value of residence lots, and less than one-tenth the actual value of business lots; and with a further showing that said commissions advised, aided and abetted persons in fraudulently evading the provisions of the Creek Agreement.

5. Whether the lack of a specific complaint by the Indian ward would be a good defense to the failure of the United States, the guardian, to fulfill its agreement obligations to its dependent Indian ward, when it is considered that substantially all the facts, records, etc., were within the sole knowledge and possession of respondent, its officers and agents.

6. Whether a respondent (defendant below) whose wrongful conduct has rendered difficult the ascertainment of the

precise damages suffered by the petitioner, is entitled to complain that said damages cannot be measured with the same exactness and precision as would otherwise be possible.

7. Whether the following are elements, and are competent evidence, to be considered in the determination of "true values" of said town lots under the circumstances in this case:

(a) An appraisal of the town lots made by the town authorities for purposes of taxation, just six months after the appraisal by the Creek townsite commission, and shown to have been a low appraisal, and exclusive of improvements;

(b) Reports on values of town lots made by the United States School Superintendent, under direction of the United States Indian Inspector for Indian Territory, made after a visit to the town and after an investigation of said values, and submitted in several instances in the same year and in one instance the same month of the appraisals by the Creek townsite commission;

(c) Reports of sales of vacant and unimproved lots sold at public auction within the same year, or within one year of the appraisals by the Creek townsite commission;

(d) Values as shown by sales of occupancy rights of town lots made at or before the date of appraisals made by the Creek townsite commissions.

8. Whether in a suit by the ward the guardian has the burden of proving the fairness of the transaction, when fraud, negligence and mismanagement by the guardian of the ward's property, and a violation of the terms of an agreement between the guardian and ward, are alleged by the ward.

9. Whether in a trial under Rule 39 (a) of the Court of Claims, wherein the sole question before the Court is the liability of the respondent, the petitioner, plaintiff below, is required to submit proof of values beyond a general showing that the appraisals of town lots by the Creek townsite commission were extremely low and did not reflect the true values of said town lots.

Statement.

By Article III of the Treaty of February 14, 1833, between the United States and the Creek Nation of Indians (7 Stat. 417, 419), the United States granted in fee simple to the Creek Nation certain lands described in said treaty in what was then Indian Territory, and which now comprise a part of the State of Oklahoma.

By Articles 4 and 15 of the Treaty of August 7, 1856, 11 Stat. 699, the United States agreed that said domain would not be included within any state or territory without the consent of the legislative authority of the Creek Nation, that the Creek Nation shall have the right of self-government, and that all white intruders on its domain shall be removed by the United States.

By Treaty of June 14, 1866, 14 Stat. 785, 786, the Creek Nation ceded to the United States the west half of its entire domain, and retained the eastern half as its permanent home, and this domain was held in communal ownership.

The settlement of the surrounding states, the demand for more land for white settlement, and the construction of railroads through the Creek national domain, caused many white settlers to intrude upon the Creek domain. In 1894 there were 250,000 white persons within the Indian Territory, and the United States was unable to comply with its treaty obligations to remove them (Rept. Comm. to Five

Civilized Tribes, dated November 20, 1894, H. Ex. Doc. No. 1, Part 5, 53 Cong., 3 Sess., Cong. Series 3305, pp. LXVII, LXVIII).

Towns were built upon the lands of the Creek Nation without lawful right, and as the populations of these towns increased the inability of intruders to secure valid titles to the lands upon which they had settled created a demand on the part of these settlers for the extinguishment of the tribal title, the division of said lands among the individual members of the tribe, and the sale of the surplus lands to white settlers (Rept. of Comm. to the Five Civilized Tribes, dated November 18, 1895, H. Doc. No. 5, 54 Cong., 1 Sess., Vol. 1, Cong. Ser. 3381, pp. LXXXVIII, XC).

By Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645-646, the Dawes Commission was created to negotiate agreements with the Five Civilized Tribes for the extinguishment of their tribal title, and the division of their lands into allotments, with a view of enabling "the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Under what is known as the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, the United States assumed full administrative control over the property and affairs of these tribes (*Cherokee Nation v. Hitchcock*, 187 U. S. 294), and thereafter began the work of the division of these tribal estates, as provided in said act.

Section 15 thereof (quoted in part, *supra*, p. 3) provided for the appointment of a commission of 3 members to plat the townsites, and to appraise and dispose of the town lots therein. The lots were directed to be appraised at their "true value" apart from the improvements, and owners of improved lots were authorized to purchase said lots at one-half the appraised value. Unimproved lots were directed to be sold to the highest bidder at public auction.

The Curtis Act was largely superseded by what is known as the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, the pertinent provisions of which are quoted *supra*, pp. 4-8). This agreement, among other things, provided substantially for the platting, appraisal, and disposal of the town lots by a commission of 3 persons appointed by the Secretary of the Interior; that persons having improvements and possessory rights to lots could purchase them at one-half their appraised value; and that the vacant, unimproved lots were to be sold to the highest bidder at public auction.

The Creek Agreement was much more favorable to settlers than was the Curtis Act, and under Sections 11-15, the occupancy rights of settlers within these towns were carefully and amply protected (R. 29-30). The clauses out of which this claim arises were all written by members of the Dawes Commission, and were most artfully and obscurely worded, so as to permit of the narrowest possible construction, and were extremely difficult of interpretation (R. 28-32).

Under both the Curtis Act and the Creek Agreement the appraisals of these town lots were required to be made at their "true value". Section 15 of the Curtis Act provided that:

"* * * all town lots shall be appraised by said commission at their true values, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisal shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot, the Secretary may fix the value thereof."

And Section 10 of the Creek Agreement provided that the Creek townsite commission, appointed by the Secretary of the Interior, under his supervision—

"shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary."

The existing act of Congress, referred to above, was the Curtis Act.

Section 11 of the Creek Agreement provided that settlers who had made substantial improvements on lots could purchase them at one-half the appraised value. The theory of this provision was that although the settlers had no legal title to the lots, yet as the improvements they had made added to the value of the real estate generally, it was considered fair that they should be allowed to receive one-half the value of the lots upon which the improvements had been made, and should therefore have the right to buy the same at one-half the appraised value (R. 27, 46).

However, the basis for this adjustment was an appraisal of the lots at their "true value". To appraise the town lots at a figure far below the true value would result in favoring the settler and work a detriment rather than a benefit to the Creek Nation, and thus would be contrary to the intent of the Creek Agreement.

MUSKOGEE TOWNSITE.

Under the Curtis Act the Secretary of the Interior appointed Dwight W. Tuttle, John Q. Adams, and Benjamin F. Marshall, townsite commissioners to dispose of the townsites of Muskogee, within the Creek Nation. Tuttle represented the Secretary of the Interior, Adams represented

the town of Muskogee, and Marshall represented the Creek Nation (R. 27).

The selection of the members of said townsite commission was most unfortunate. Chairman Tuttle was most incompetent and inefficient in mind and methods, and his conduct was essentially corrupt. He was so bad a business man that his colleagues on the commission declined to comment upon it (R. 45). He secured the appointment of his wife as clerk of the townsite commission and she was of no practical service to the commission. During the time she was thus employed a lot was given to her by A. Z. English, who profited most by the system of scheduling adopted by the commission, the acceptance of which lot at the time was highly improper. Tuttle either destroyed or burned the records of the commission (R. 45). The commission favored the low appraisal of the town lots, and took the view most favorable to the white settlers (R. 45-46). The Creek representative, Benjamin Marshall, knew very little of values, and Commissioner Adams considered it his duty to appraise the lots at a low figure for the benefit of the town he represented (R. 24-46).

On the recommendation of this commission, the Secretary of the Interior appointed H. V. Hinckley as surveyor to survey and plat the town. The area of the townsite as platted and surveyed, was 2,444.76 acres, and the town was divided into 3895 town lots. The survey and plats were completed in April, 1900 (R. 27).

The Muskogee townsite commission appraised the town lots of Muskogee at \$238,835.00, or about \$100.00 per acre. The population of the town at the time of said appraisal was from 4,500 to 5,000 persons. It was an exceedingly prosperous and progressive town in the midst of an exceedingly fertile country, and was located on the Missouri, Kansas and Texas Railroad (R. 34, 61).

Said appraisal was purely arbitrary, unreasonable, and most improper, and no attempt was made to appraise the town lots at their "true values". The Commissioners merely made an arbitrary estimate at the outset of what they considered the townsite was worth, and then proceeded to classify and appraise the lots accordingly. In many instances the mere occupancy right sold for many times the appraised value of the town lot (R. 35-37). Although this was well known to the commission, yet in making the appraisals, it did not take the value of the occupancy right of a lot into consideration (R. 36-37).

Thus the average appraisement so made was less than one-third of the actual market values of the lots at the time, while in the case of business property it was often less than 10 per cent of the actual market value (R. 38).

On June 21, 1900, the schedule of appraisement thus made was submitted to the Secretary of the Interior for his approval (R. 37-38). In submitting said schedule the United States Inspector for Indian Territory, J. George Wright, in his letter to the Secretary, dated June 21, 1900, stated as follows (R. 38, 62-63):

"In my judgment, the appraisals of business lots are fixed at an extremely low figure in some instances, considering what prices such property as has been and is held for occupancy rights only."

In the communication of the Commissioner of Indian Affairs to the Secretary of the Interior, dated June 23, 1900, the Commissioner commented that the appraisals were extremely low; but he nevertheless recommended the approval of the said schedule of appraisement (R. 60-61).

In accordance with the recommendation of the Commissioner, the Secretary, on June 28, 1900, without further investigation, approved said schedule of appraisement, with full knowledge that the appraisement of said townsite was

"fixed at an extremely low figure", and that it was but a small fraction of the "true value" of Muskogee townsite (R. 38).

The work of this commission was suspended pending the outcome of legal proceedings to test the constitutionality of the Curtis Act, and until an agreement could be negotiated between the United States and the Creek Nation authorizing the disposition of said townsites (R. 28).

Soon after the ratification of the Original Creek Agreement, the Secretary, on June 28, 1901, reappointed Tuttle, Adams, and Marshall as Muskogee townsite commissioners to appraise and sell the town lots under the terms of the Creek Agreement (R. 32). The time allotted for this work was unreasonably short, and the old appraisement, made more than a year before under the Curtis Act, was accepted and approved by the Secretary on August 10, 1901, as the proper appraisement of the town lots under the Creek Agreement, to the further disadvantage of the Creek Nation, said values having increased in the meantime (R. 32-33).

The business methods of said Muskogee townsite commission in scheduling and disposing of the town lots to claimants under the terms of the Creek Agreement were execrable. In the rush to complete the work within the unreasonably short time fixed by the Secretary of the Interior everything went. Bills of sale or quitclaim deeds, or any number of them, made to persons all over the United States were accepted, without inquiry, as evidence of the right of claimants to have lots scheduled to them at one-half their appraised values. No record was made showing upon what sort of claim of title or right of occupancy the scheduling was done, and the bills of sale and quitclaim deeds were returned to the parties exhibiting them. The minutes of the commission and nearly all of its papers were either lost or deliberately destroyed (R. 34, 45).

The townsite commission openly permitted persons having large holdings of land within the townsites to schedule individual lots to "dummies", who deeded back the lots to said excess holders upon receipt of the deeds from the Creek Nation. This method enabled said excess holders to keep most of their holdings in violation of the limitation for town lot holdings contained in the Creek Agreement, and permitted them to secure said excess lot holdings at one-half the appraised values. Thus the Creek Nation lost most of the values of said lots, which should have been sold at public auction under Section 14 of the Creek Agreement (R. 40-44).

In many instances lots were scheduled to persons claiming fictitious improvements on town lots, thus permitting said claimants without lawful right to purchase lots at one-half their appraised values under Section 11 of the Creek Agreement (R. 38-40).

The town authorities of Muskogee appraised the town lots in February, 1902, for tax purposes, apart from the improvements, at \$1,063,366.00, or more than four times the amount of the appraisal of the Muskogee townsite commission, approved six months before, and this appraisal was considered a low one (R. 34-35).

The vacant lots, evidently the poorer lots or those which were appraised comparatively high, sold at public auction in July, 1902, for \$21,160. These lots were appraised by the Creek townsite commission for \$7,957 (R. 18, 35). Thus less than a year after the Muskogee schedule of appraisal was approved these lots were sold at public auction for nearly three times the appraisal by the Creek townsite commission (R. 35).

WAGONER TOWNSITE.

Under the terms of the Curtis Act, the Secretary of the Interior appointed Tony Proctor, H. C. Linn, and J. H.

Roark as townsite commissioners to appraise and dispose of the townsite of Wagoner, within the Creek Nation (R. 47). The work of this townsite commission was suspended until the outcome of litigation testing the constitutionality of the Curtis Act (R. 19).

Upon the ratification of the Creek Agreement, this commission was reinstated, and the work was completed under the terms of the Creek Agreement. The same conditions existed in Wagoner as in Muskogee, and the same methods of appraising and scheduling the lots were used by both commissions. The appraisals were arbitrary and fictitious and no consideration was given to actual values. The appraisal made a year before (1900) under the Curtis Act was adopted and used under the Creek Agreement. Lots were scheduled by many persons for others in violation of the Creek Agreement, and bills of sale and quitclaim deeds were accepted as sufficient evidence of title to lots without further inquiry (R. 18-19, 38, 47-48).

The vacant and unimproved lots were sold at public auction in the town of Wagoner, under Section 14 of the Creek Agreement. These sales show the disparity between the appraisals by the Creek townsite commission, and the values as evidenced by the prices paid for these lots at public auction, as follows:

On July 30 to August 1, 1902, 204 vacant and unimproved lots in Wagoner, appraised by the Creek townsite commission for \$2701.00, sold at public auction for \$6608.50; and on July 18, 1903, 62 lots, appraised by the Creek townsite commission for \$955.00, sold at public auction for \$8674.00 (R. 16, 19).

OTHER CREEK TOWNSITES.

In September, 1901, upon the completion of the appraisal of the townsites of Muskogee and Wagoner, the Secretary of the Interior appointed Dwight W. Tuttle, H. C. Linn, and

George A. Alexander as commissioners to complete the appraisals of the remaining Creek townsites under the Creek Agreement. The work of this commission was placed under the direction of the United States Inspector for Indian Territory (R. 38).

The two new members of the commission did not bring about a change in the methods theretofore used in either appraising or scheduling lots in these townsites. Commissioner Linn was careless and unbusinesslike in mind and methods (R. 47-48). Commissioner Alexander knew little of values, and most of the scheduling was done by the other two commissioners in his absence (R. 24, 49); he was also interested in low appraisals as he owned three lots in Wetumka (R. 50).

Therefore, in all of the remaining townsites within the Creek Nation, the same lax methods were employed by this commission as were employed in Muskogee (R. 47-50). The commission, especially Chairman Tuttle, went so far as to suggest to claimants the fraudulent means of scheduling town lots by the use of "dummies", which methods were acceptable to the commission (R. 51-52, 59; Lynch dep., Appen., pp. 50-51).

In all of these townsites the appraisements of this commission were arbitrary and fictitious, and were made upon an estimate by said townsite commissioners at the outset as to what they thought a town should bring (R. 50, 69-70). Although this commission had knowledge of what had been paid for occupancy rights to town lots within these towns, yet no attention was paid to this element of value in fixing the values of said town lots (R. 50). Therefore, said appraisements by said commission, as approved by the Secretary of the Interior, were arbitrary and did not reflect the "true value" of said town lots at the time of appraisal by said townsite commission.

When the Creek Council, on October 13, 1904, passed an act requesting an investigation into the disposals of said town lots, said act was vetoed by Pleasant Porter, their Principal Chief, who was interested in Creek townsite property (R. 23-24, 52-54). However, this act was passed over the veto of the Principal Chief, and was forwarded to the Secretary of the Interior for approval by the President (R. 54). The Secretary refused to order the investigation in accordance with this Act of the Creek Council (R. 59-60, 65). Another effort was made by the Creek Council in 1905 to secure an investigation into town lot matters, but this effort also was unsuccessful (R. 24, 66-67). The Creek Nation, by act of its council, approved October 19, 1906, again demanded that an investigation be made into the disposition of town lots within the Creek Nation (R. 23). In response to this demand, William D. Foulke was appointed Special Inspector for the Interior Department, and was directed to make a thorough investigation into Creek town lot frauds (R. 22, 54, 65-66).

Inspector Foulke's comprehensive report, dated December 19, 1906 (R. 22-50), is based upon a large amount of testimony taken, and exposed every phase of the frauds practiced upon the Creek Nation in the appraisal and disposition of Creek town lots.

This report was later confirmed by Charles Nagel, Esquire, who was appointed by the President to look into these Creek town lot matters (R. 50-52).

Although all of these facts were before the lower court, yet in making the findings of fact in this case, the lower court failed to give adequate consideration to said facts, and made findings which have no substantial evidence to support them.

From the holding of the lower court denying to petitioner the right to recover under the circumstances outlined above, we respectfully submit the case for the consideration of this Court upon the facts and the law.

Specification of Errors to Be Urged.

The lower court erred:

1. In holding that the Creek Nation is not entitled to recover from the United States for the failure of the United States to appraise and dispose of the town lots within the Creek Nation at their "true value", as was required by the terms of the Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861.

2. In holding that petitioner need show fraud in order to recover, rather than holding that petitioner need show merely a violation of the terms of the Creek Agreement.

3. In failing to apply the rule laid down in *Seminole Nation v. United States*, 316 U. S. 286, decided May 11, 1942, wherein this Court held that "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. * * * Its conduct, as disclosed in acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

4. In holding that the evidence submitted was not sufficient to show fraud and gross undervaluation in the appraisal and disposal of Creek town lots, and that said appraisals and disposals were not made in violation of the terms of the Creek Agreement, when it is shown that said appraisals were made by commissioners who were most inefficient and incompetent in mind and method; that they displayed an utter disregard for the rights and interests of the Creek Nation in appraising and scheduling Creek town lots; that the appraisals were purely arbitrary and had no relation to true values, but proceeded from the inner consciousness of the members of said commission; that the commissioners did not consider as an element of value in appraising the lots the values shown by the sales of possessory rights;

and that the townsite commission permitted frauds to be openly practiced before it, and in the scheduling of lots said commission advised, aided and abetted persons in evading the provisions of the Creek Agreement.

5. In failing to hold that the approval of said low appraisals by the Secretary of the Interior with knowledge, or ample means of knowledge, that said appraisals of the townsite commission were extremely low, showed negligence on the part of respondent, its officers and agents, in protecting the rights and interests of its Indian ward, which would create a liability on the part of respondent for any loss thus occasioned to petitioner, through a failure of respondent to comply with the terms of the Creek Agreement.

6. In holding that the lack of a specific complaint by the Indian ward would be a good defense to the failure of the United States, the guardian, to fulfill the agreement obligations to its dependent Indian ward, when it is considered that substantially all the facts, records, etc., were within the sole knowledge and possession of respondent, its officers and agents.

7. In failing to apply the principle that a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible (*Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U. S. 359).

8. In failing to find and hold that the following data are competent evidence, and are elements to be considered in the determination of the "true value" of said town lots under the circumstances in this case:

(a) An appraisal of the town lots made by the town authorities for purposes of taxation, just six months after the appraisal by the Creek townsite commission,

and shown to have been a low appraisal, and exclusive of improvements;

(b) Reports on values of town lots made by the United States School Superintendent under direction of the United States Indian Inspector for Indian Territory, submitted after a visit to the town and after an investigation of said values, within a year, and in one instance the same month, as the appraisals by the Creek townsite commission;

(c) Reports of sales of vacant and unimproved lots sold at public auction within the same year, or within one year of the appraisals by the Creek townsite commission;

(d) Values as shown by sales of occupancy rights of town lots made at or before the appraisals of the Creek townsite commission.

9. In failing to find and hold that an appraisal of business lots at one-tenth their actual market value, and an appraisal of residence lots at one-third their actual value, was not a gross undervaluation of said town lots under the Creek Agreement which required said town lots to be appraised at their "true value".

10. In finding and holding that the Creek townsite commissioners were qualified to discharge the duties for which they were appointed, and that in making the appraisals they exercised their best judgment.

11. In finding and holding that the Creek Nation did not complain of said frauds and wrongs done them in the appraisal and disposition of said town lots before the institution of this suit.

12. In failing to give due consideration to the comprehensive report of the Interior Department's Special Inspector William D. Foulke, dated December 19, 1906, setting forth in detail the grossly negligent and fraudulent manner in

which the appraisals and disposals of Creek town lots were made by said incompetent Creek townsite commission.

13. In finding that there is no proof in the record from which it can determine the true value of the lots at the time they were appraised by the Creek townsite commission.

14. In holding that the petitioner need prove that there was no change in conditions between the time of the appraisal by the Creek townsite commission and the reports of the United States School Superintendent for Indian Territory on values of said town lots, the reports of sales of unimproved, vacant lots at public auction, the appraisal by the town authorities for tax purposes of the town lots apart from the improvements and shown to be a low one; when it is shown that said reports, sales, and appraisal were made during the same year, within one year, and in several instances the same month as the appraisals of the Creek townsite commission.

15. In finding that prior to the time of the appraisals by the Creek townsite commission no town lots within said Creek domain had ever been sold, and no market values had been established.

16. In finding with respect to Muskogee, that the appraisal by the town authorities does not show how much of the aggregate of the assessment for taxation includes assessment on the improvements, and how much on the lots, when the record shows that the appraisal of \$1,063,366.00 was of the town lots alone, apart from the improvements.

17. In failing to find the amount of recovery in the suits filed to recover town lots illegally scheduled, the expenses of said litigation, the net recovery, and the estimated value of the town lots involved.

18. In holding that the burden of proof is on petitioner, the ward, to show the unfairness of the transaction when

fraud is alleged and a fiduciary relationship exists between the parties, rather than holding that in such case the burden of proof is on the guardian to show the fairness of the transaction.

19. In holding that in a trial under Rule 39(a) of the Court of Claims—wherein the sole question before the court was the liability of the respondent—the petitioner, plaintiff below, was required to submit evidence of values of the most meticulous character to support its case; rather than holding that a showing that the appraisals made by the Creek townsite commission were generally extremely low would be sufficient to support petitioner's case at this stage of the proceeding.

Reasons for Granting the Writ.

The Creek Nation respectfully requests this Court to grant certiorari to review the decision of the lower court in this case, for the reason that said decision is not in accord with the applicable decisions of this Court defining the duties of the United States, as guardian, in dealing with its dependent Indian wards; and as particularly defined in *The Seminole Nation v. The United States*, 316 U. S. 286. Furthermore, petitioner contends that there is a lack of substantial evidence to sustain certain of the findings of fact made by the lower court, and a failure to find material facts, as will be hereinafter pointed out to the Court.

The issue herein presented arises out of the provisions of Section 15 of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, 500-501, and Sections 10-15 of what is known as the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, 864-866, providing for the disposition of town lots in the townsites segregated from the Creek national domain at the time of allotment of their lands in severalty.

In the lower court the petitioner (plaintiff below) contended that respondent, in disregard of its plain duty as guardian of petitioner, and in violation of the Curtis Act and the Creek Agreement, neglected and failed to appraise the Creek town lots at their "true value", and otherwise failed to dispose of said town lots in accordance with law; and that respondent knowing, or having ample means of knowing, that said appraisals were extremely low, nevertheless approved them without an investigation into the facts. Thus respondent permitted said low appraisals to stand, and caused loss to petitioner of the difference between the "true value" and the wrongfully low appraisals.

In deciding this issue it is submitted that the lower court failed to apply to this case the principle laid down by this Court in *The Seminole Nation v. The United States*, 316 U. S. 286, decided May 11, 1942, governing the conduct of the United States in dealing with its dependent Indian wards. This Court said (*supra*, pp. 296-297):

"In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

The lower court defines the issue as follows (R. 11):

"The question for our determination, therefore, is whether or not these townsite commissions were guilty of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites."

We submit that the question, as thus outlined by the lower court, is too narrow in its relation to this case, and is in conflict with the above quoted principle laid down by this Court in the Seminole case.

The lower court evidently relies upon the cases of *Johnson v. Riddle*, 240 U. S. 467, 474, and *Ross v. Stewart*, 227 U. S. 530, 538-539, in support of its holding. An examination of these cases discloses that they have no application to the case at bar. These cases involved contests over the right of possession to certain town lots in the Chickasaw and Cherokee Nations, and were between parties dealing as equals. This court simply held that these were adversary proceedings in which the parties had notice and a hearing, or had ample opportunity to be heard, and wherein the parties had a right of appeal to the Commissioner of Indian Affairs and the Secretary of the Interior. Admittedly administrative action in an adversary proceeding between parties dealing as equals would be final in the absence of gross mistake or fraud.

However, we have an entirely different situation before us in the case at bar, wherein the United States is guardian of the Creek Nation and has assumed complete administrative control over the property and affairs of petitioner (*Cherokee Nation v. Hitchcock*, 187 U. S. 294), and wherein the Creek Nation is dependent upon the United States for the proper execution of the Creek Agreement, and wherein the special jurisdictional act (quoted in part, *supra*, p. 2) directs the court to inquire into the administrative action of the Government with respect to violations of treaties and agreements made with the Creek Nation. As between the parties hereto the issue is whether or not the United States, the guardian, has fulfilled its agreement obligations with the Creek Nation, its dependent Indian ward, and whether in carrying out its agreement obligations it has measured up to exacting fiduciary standards.

Under the Creek Agreement the Creek townsite commissions were given no judicial powers in the platting, appraising and scheduling of Creek town lots. They had no power to swear witnesses, hear and pass upon evidence, or to make a final decision in an adversary proceeding. All of the work of the commissions was to be done under the supervision of the Secretary of the Interior, and was subject to his approval. These commissions, and the Secretary of the Interior were merely the administrative agencies through which the United States acted in carrying out the terms of the Creek Agreement. In passing upon the terms of the Creek Agreement and the duties of the United States under this agreement, in *United States v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 508-509, the court said:

“ * * * The terms of the agreement, we have noted, were very explicit as to the appraisement and scheduling of the property to persons in possession, the percentage of the appraised value they were to pay under the varying circumstances, etc. The Secretary of the Interior, as the representative of the United States, was required to follow these provisions in disposing of the lots. As the representative of the United States, the duty and obligation clearly devolved upon him to dispose of the lots in the manner provided by the agreement, and to secure as proceeds therefrom, for the benefit of the tribe, the full amount to be realized in strict accordance with its terms. The commission provided for by the act for the appraising and scheduling of the lots was appointed by the Secretary, represented him and the United States in the matter, and the Secretary and the commission were merely the agencies through which the United States acted in carrying out the provisions of the agreement. * * * ”

We submit that the findings of the lower court are at variance with the record in this case. The record clearly shows that the conduct of the respondent (defendant below), its officers and agents, fell far below exacting fiduciary stand-

ards. In support of this statement we outline the following causes of the wrongs herein complained of:

1. The appointment of incompetent townsite commissions to appraise and dispose of the Creek town lots;
2. The arbitrary and fictitious appraisals made by these incompetent commissions, which made no proper effort to appraise the town lots at their "true value", as was required by the Creek Agreement.
3. The failure of the Secretary of the Interior to supervise the work of these townsite commissions, as was required by the Creek Agreement; and
4. The approval of the extremely low appraisals with positive knowledge that they were extremely low, and that they did not reflect the true value of the town lots, as was required by the Creek Agreement.

All of these points are properly substantiated by the record in this case, and show clearly that respondent utterly neglected to do its duty under the terms of the Creek Agreement, and this failure resulted in the loss of considerable of the value of the town lots to the Creek Nation.

We comment on each of the above points below.

1.

PERSONNEL OF THE TOWNSITE COMMISSIONS.

The selection of the personnel of the townsite commissions was most unfortunate, and was one of the causes for the failure of defendant to perform its obligations to the Creek Nation under the Creek Agreement. Commissioner Tuttle, who was chairman, was most inefficient and incompetent in his business methods. His conduct was essentially corrupt. He was so bad a business man that his colleagues on the commission declined to express an opinion of his business methods. The record shows that he secured the

appointment of his wife as clerk of the commission, though she was of no practical service to the commission. A lot was given her by A. Z. English, who profited most by the system of scheduling adopted by the commission, the acceptance of which lot at such a time was highly improper. Evidently to avoid investigation, Tuttle either destroyed or burned the records of the commission (R. 45-46). The record further shows that he even suggested to claimants for town lots the fraudulent means of scheduling the lots by the use of "dummies", which means were acceptable to the commission (R. 52, 58-59; Lynch dep., Appen., pp. 50-51). Not only were his business methods corrupt, but his personal conduct also was the subject of investigation (R. 45-46). The selection and appointment of such a person by the Secretary for this important work could lead only to the wrongs that subsequently resulted.

Commissioner John Q. Adams represented the town of Muskogee, and considered it his duty to make a low appraisal of the town lots for the benefit of the town. He evidently was in sympathy with the whole sentiment of the community, that the settlers should not be punished for putting up improvements, though, as Inspector Foulke comments, "the Creek Agreement apparently intended to give part of these values to the Creek Nation" (R. 46).

Commissioner Benjamin Marshall was selected by Pleasant Porter, Principal Chief of the Creek Nation, who was himself interested in Muskogee town lots (R. 27, 32, 44-45). Marshall also was in sympathy with the views of the settlers, and felt that if the town lots had been given away gratuitously, the Creek Nation would have been helped more. As Inspector Foulke comments, "It would be more difficult for a Creek Indian, living on a farm on a distant allotment to realize the advantages he had received from the gratuitous gift of the town site of Muskogee" (R. 46).

Marshall testified that he bought one lot for \$350.00 and sold it before the final scheduling. Thus this Commissioner himself paid \$350.00 for the mere occupancy right to a lot, the fee title of which was appraised by the commission at \$160.00 only (R. 37, 63-64). We believe that Chief Pleasant Porter was correct when he stated that the Indian representative on the commission "did not know much about it" (R. 24).

After the completion of the work of the Muskogee and Wagoner Townsite Commissions, a new commission was appointed to appraise and dispose of the remaining Creek townsites. Commissioner Tuttle remained as chairman, and H. C. Linn, and George A. Alexander were appointed to succeed Adams and Marshall of the Muskogee townsite commission (R. 38).

The record shows that Commissioner Linn, like Tuttle, was careless and unbusinesslike in mind and methods. Commissioner Alexander, Linn's colleague on the Creek townsite commission, being asked as to Linn's qualifications answered, "Well I don't believe I care to say anything" (R. 47).

Commissioner Alexander was selected by the Principal Chief and did not know much of values or the work of the commission. He also owned three lots in Wetumka and was interested in low appraisals. Inspector Foulke states of Mr. Alexander, that "my judgment is that he attempted to schedule the lots properly, but was greatly embarrassed by two inefficient colleagues, who as he states scheduled a great many lots in his absence" (R. 24, 49-50).

Charles Nagel, Esquire, of St. Louis (who was directed by the President to examine into Creek town lot frauds, and to verify the findings of Inspector Foulke), states in

his report to the Secretary of the Interior, dated February 9, 1907 (R. 51):

“ * * * Again, it is perfectly apparent that in the Creek Nation the Commission was less diligent, to put it mildly, to protect the interests of the Government's wards. It is true that this Commission gave the Government, the town and the Creek Nation each representation. But so far from affording the Creek Nation additional protection by this means, the very composition of the Commission was used as an argument to approve anything and everything that might be done in its name. In other words, I cannot resist the conclusion that the composition of this commission was but another step in the wrong that had been contemplated against the Creek Nation. In a word, so far as the Creek Nation is concerned, I have found nothing to disturb or to shake the main conclusion arrived at by Mr. Foulke.”

That the defendant, as guardian of petitioner, should have used diligent care in the selection and supervision of these commissioners is a well-settled principle of law. In *Bogert on Trusts and Trustees*, par. 555, p. 1770, the principle is stated as follows:

“If a trustee is negligent in selecting or supervising an agent or servant, he will be held liable to the beneficiary for the damage resulting; and the trustee will be liable to the cestui for the negligence or improvidence of the agent in the performance of his duties, as where an attorney employed to collect a claim delays unduly.” (Cases cited).

It is evident that these townsite commissioners had no regard for the rights and interests of the Creek Nation, and that they were most inefficient, incompetent, and unbusinesslike in carrying out the duties entrusted to them; and that the composition of the commissions was one of the causes of the loss thus occasioned to the Creek Nation.

THE APPRAISALS DID NOT REFLECT THE "TRUE VALUE" OF
THE TOWN LOTS.

The record clearly shows that the Creek townsite commission did not endeavor to appraise the Creek town lots at their "true value", as was required by the Creek Agreement.

Again in the report of Inspector Foulke there is ample evidence of the wrong done the Creek Nation through the grossly low appraisals of the Creek town lots by the Creek townsite commissions. Mr. Foulke reviews the manner in which these appraisals were made, as disclosed by Mr. Adams, of the Muskogee townsite commission, as follows (R. 37):

"They graded the lots off, however, from one class into another. It would thus appear that the appraisal was a purely arbitrary one proceeding from the inner consciousness of the Commissioners, and that it had no reference whatever to actual value. They might as well have made it one mill or fifty dollars."

Mr. Foulke then reviews the evidence he had before him showing clearly that the appraisals by the townsite commission were ridiculously low, and we respectfully refer the Court to his report (R. 34-38) setting forth this evidence in detail. In substance he stated: That Muskogee was an exceedingly prosperous and progressive town in the midst of an exceedingly fertile country, with a population of between 4,500 to 5,000; that notwithstanding this, the townsite commission appraised the town lots at \$238,835, only; that in February, 1902, the town authorities conservatively appraised the town lots, apart from the improvements, at \$1,063,366.00, or more than four times the amount of the appraisal of the townsite commission approved less

than six months before; that less than a year after the approval of the appraisal by the townsite commission the unimproved, vacant lots in the townsite, appraised by the townsite commission for \$7,983.00, sold at public auction for a total of \$22,595.00, nearly three times the appraisement (R. 34-35).

Mr. Foulke further reviews the values of town lots as shown by the sales of the mere possessory rights at or before the appraisal by the townsite commission, and compares these sales prices with the appraisals. The following statement shows the great disparity between the prices paid for the mere possessory rights to town lots and the appraisals of the fee simple title by the townsite commission (R. 35-37):

| Appraisal of fee simple title to lot by the Muskogee townsite commission. | Sales prices of the mere possessory right to lot. |
|---|--|
| 80.00 | 1,000.00 |
| 300.00 | 800.00 |
| 325.00 | 2,000.00 |
| 560.00 | 1,200.00 |
| 245.00 | 2,000.00 |
| 160.00 | 350.00 |

Mr. Foulke finally concludes his review of the appraisal as follows (R. 38):

“While it is utterly impossible now to state what was the real value of the town of Muskogee, when the appraisement was made, I am convinced that the average appraisement was less than one-third of the actual market value of the land at the time, while in the case of business property it was often less than 10% of the actual market value.”

With respect to the appraisals of the other Creek towns by the townsite commission, Inspector Foulke states (R. 50):

“The actual selling value of the possessory rights in these towns however, was never considered, and I have no doubt that great numbers of lots were appraised at very much less than their value. The commissioners made an estimate at the outset what a town ought to bring and then proceeded to classify and appraise the lots accordingly, a plan which was utterly arbitrary and improper.” (See testimony of Alexander, R. 69-71.)

The report of Inspector Foulke was made long before the present controversy arose, and forms a part of the Government's own records. With this report before the lower court, it is difficult for us to understand the findings that these townsite commissioners were competent, and that they exercised their best judgment in making said appraisals (R. 7-8).

3 and 4.

THE SECRETARY OF THE INTERIOR FAILED PROPERLY TO SUPERVISE THE WORK OF THE TOWNSITE COMMISSIONS, AND APPROVED THE LOW APPRAISALS WITH KNOWLEDGE THAT THEY WERE EXTREMELY LOW.

The record shows that there was little or no supervision of the work of the townsite commissions, and that the Secretary approved the schedules of appraisement with knowledge that the lots were appraised at an extremely low figure, and no effort was made to correct this wrong done to the Creek Nation.

In submitting the appraisement of Muskogee townsite, the United States Inspector for Indian Territory, J. George Wright, in his letter of June 21, 1900, to the Secretary of the Interior, stated as follows (R. 7, 38, 62-63):

“In my judgment, the appraisals of business lots are fixed at an extremely low figure in some instances, considering what prices such property as has been and is held for occupancy rights only.”

The Secretary, however, approved the appraisal with full knowledge that it was "extremely low", without further investigation, and with a full realization that it represented but a small fraction of the "true value" of Muskogee townsite (R. 7-8, 38, 60-61).

Although the Creek Agreement required the appraisals to be made under the *supervision* of the Secretary of the Interior, and were to be approved by him, yet the Secretary decided that the Indian Inspector at the Muskogee office, need not review the correctness of the appraisals made by the townsite commissions (Wright dep., Appen., p. 47) and even though the Secretary's attention was directed to the fact that the appraisals of the fee simple title of the town lots were extremely low, and were far below what the mere possessory rights sold for, yet the Secretary failed to order a review of the low appraisals and permitted them to stand. The record further shows that the United States Inspector for Indian Territory knew that the same condition existed in all of the other Creek towns, but that he did not so report it (Wright dep., Appen., pp. 47-50).

Therefore, judged by the most exacting fiduciary standards, it is evident that the conduct of the respondent shows an utter disregard of the rights and interests of its dependent Indian ward, and that it should be required to make good this loss to the Creek Nation.

The Nature of Petitioner's Proof.

On this phase of the case the lower court said (R. 14):

"The record indicates that the appraisals were low, but we are by no means convinced that they were fraudulent, or that such gross mistake was made as to justify us in setting aside the appraisals made, and to undertake now, forty years later, to determine what the true values were."

It is difficult for us to understand this statement in the light of the evidence before the lower court, when it is shown that the appraisals by the townsite commissions were in some instances less than one-third the actual values of the town lots, and less than one-tenth the actual values in other instances. How much farther must petitioner go in its proof to convince the lower court that these town lots were grossly undervalued by the Creek townsite commissions?

We submit that here again the lower court has considered the question before it in too narrow a light. Also we believe that the lower court has overlooked the fact that the proof submitted by petitioner is a part of the Government's own records, and consists of reports of its own agents, and is not new evidence presented by petitioner for the first time, forty years later. We submit that the petitioner has a right to rely upon this evidence, when, after all these years, its guardian has given it this, its first opportunity, to present the matter to a court for final determination.

Furthermore, we submit that the lower court erred in failing to apply to this case the principle that a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible, which principle was applied by this Court in *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U. S. 359. The lower court applied this principle in *The Chippewa Indians of Minnesota v. The United States*, 91 C. Cls. 97, 132, 133, and we submit that it should have been applied with equal force in the case at bar. It is significant to notice also that in the Chippewa case, the lower court held that an appraisal of 50 per cent of the

actual amount of timber on the acreage involved was "grossly erroneous" (supra, p. 117). If this is true, then an appraisal of one-third and one-tenth of the actual value would also be grossly erroneous, and ever so much more so, and leaves no doubt in our minds that the respondent, its officers and agents, fell far short of exacting fiduciary standards.

The proof offered by petitioner is classified as follows:

1. Appraisals for purposes of taxation made by town authorities made less than six months after the appraisal by the townsite commission, and shown to be a low one, and also that the town lots were appraised apart from the improvements;

2. Sales of vacant, unimproved lots at public auction within a year or less of the appraisal by the Creek townsite commissions;

3. Reports of values of town lots made by the United States School Superintendent for Indian Territory, under direction of the United States Inspector for Indian Territory, submitted within a year, and one within the same month of the appraisal by the Creek townsite commissions (See report on Bristow, R. 68);

4. Values shown by sales of possessory rights to lots at or before the appraisals by the Creek townsite commissions.

Of this evidence the lower court states (R. 13):

"Although there is a large disparity in some of the figures, yet it must be remembered that prior to the time the townsite commissions made their valuations there had been no market for the lots, because the lots could not be sold."

We submit that the above quoted statement that "there had been no market for the lots, because the lots could not be sold" is clearly in error. Many of these towns had been

long established, and the white settlers were anxious to secure the title to the lots upon which they had made improvements, and had brought much pressure to bear upon Congress to effectuate this purpose, and to protect their improvements. Hence, the protection to possessory rights contained in the provisions of the Creek Agreement, and the provisions that settlers could purchase at one-half the appraised value lots upon which they had placed improvements, or had secured the possessory right. These possessory rights were sold, and there was great activity in these sales at the time and before the appraisals by the townsite commissions (R. 36-37; Wright dep., Appen., pp. 47-50). These sales reflected in a measure the actual market value of the lots, without improvements, at or before the appraisals made by the Creek townsite commissions (R. 35-37). Notwithstanding these facts, the Creek townsite commissions did not take these values into consideration in making the appraisals of the town lots, even though they had knowledge of them, and the appraisals in most instances were made far below what the mere possessory rights sold for (R. 36, 38, 50).

Therefore, the above statement of the lower court is not supported by any substantial evidence in the record.

The lower court makes the finding that (R. 8-9):

“The appraisals of the entire lots in a number of the towns were considerably lower than the aggregate amount at which the town authorities assessed these lots for taxation in the following year, but it is not shown how much the aggregate of the assessment for taxation includes assessment on improvements, and how much on the lots, nor is it shown that conditions were the same at the time of appraisal and at the time of assessment for taxation.”

This finding is not justified with respect to the townsite of Muskogee, for the record clearly shows that the tax ap-

praisal of \$1,063,366.00 was for town lots *only* apart from the improvements, and was made less than six months after the appraisal of \$238,835.00 made by the Creek townsite commission (R. 34); and that although values had risen considerably, yet they had not risen 400% (R. 34-35). Furthermore, there was other evidence in the record to support the finding of Inspector Foulke that the appraisal was less than one-third the value of residence lots, and one-tenth the value of business lots (R. 35-38). Clearly the general finding of the lower court above quoted is not justified or substantiated by the evidence in this case.

The lower court criticizes the values shown by the reports of the United States School Superintendent for Indian Territory, made after an investigation of values of town lots and after a visit to each of the towns, because petitioner "does not show that values had not increased" in the interim between the dates of said reports and the time of appraisal by the Creek townsite commission (R. 13). This criticism of the lower court surely would not apply to the reports that were made within a year or less of the date of appraisals of the townsite commissions. In fact, the report with respect to the town of Checotah was submitted in July, 1902, the same month in which the appraisal of this town was approved by the Secretary of the Interior (R. 21-22). The record also sets forth the values of town lots as shown by sales of vacant, unimproved lots sold at public auction in the various townsites. These sales were made within a year of the appraisals by the townsite commissions, and many were made in the same year as the appraisals (R. 16-19, 21-22). This evidence certainly is competent to show actual values of these town lots at or about the time of said low appraisals by the townsite commissions.

We submit that the evidence presented by petitioner is precise and direct on the question of value. However, if it

was not as precise as it might have been, respondent cannot be heard to complain. We believe that the lower court erred in failing to apply to this case the principle laid down by this Court in the Eastman case, *supra*, with respect to this proof.

The Creek Nation Complained of Frauds in Creek Town Lot Disposals.

The lower court stated (R. 12-13):

“The tribe itself had never complained that these appraisals were too low until this suit was filed. * * *

* * * * *

“* * * So far as is known, the first complaint that has ever been registered for undervaluation of these lots by the townsite commissions was registered when this suit was instituted—thirty years after the appraisals were made.

“Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations * * *

These conclusions of the lower court are not justified, even by its own findings, which show that in 1904 the Creek Nation passed an Act requesting that “an investigation be made of the scheduling and appraisal of the lots” (R. 8, 52-54). This request was denied by respondent (R. 59-60). On October 19, 1906 the Creek Nation again requested that an investigation of these frauds be made (R. 8, 22-23, 65-67).*

* In Finding 8 the lower court stated (R. 8):

“Later, on October 19, 1906, the Creek Nation presented a memorial to Congress complaining of wrongful scheduling of the lots, but in this memorial no complaint was made that they had been appraised too low. As a result of this memorial, an Act was passed (34 Stat. 137, 144), authorizing the filing of suits to remedy the wrongs complained of. * * *

Furthermore, the record shows that the Creek Nation had three times through its legislative council asked for an investigation of what it believed were serious frauds in the appraisal and disposal of town lots in that nation (R. 65-67).

Even if these complaints had not been made we do not believe that such a fact would affect the matter before us on its legal merits. It is self-evident that a guardian is required to do his duty with respect to the ward's property irrespective of any complaint from the ward; and clearly the guardian would not be excused from complying with its agreement just because its ward did not complain about the wrong done to it, and did not know the extent of it until years later, and when all the facts are within the sole knowledge of the guardian.

In *United States v. Creek Nation*, 295 U. S. 103, 110, this Court said:

“ * * * It [the Creek tribe] was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.”

Evidently the lower court was under the impression that petitioner would be required to present proof of the strong-

A reference to 34 Stat. 137, 144, shows that the act referred to was the Act of April 26, 1906, enacted six months before the memorial of the Creek Nation of October 19, 1906; and therefore this act could not have been passed pursuant to said memorial.

Some of the other discrepancies in the findings of the lower court are listed as follows:

In Finding 6 the lower court endeavors to find the facts with respect to the appraisals of Muskogee and Wagoner (R. 7-8). The first sentence correctly states the facts. The facts thereafter stated, however, relate solely to Muskogee (R. 32-33, 37-38), and the court fails to find the facts with respect to Wagoner (R. 18-19).

In Finding 7 the lower court states (R. 8):

“The lots in the town of Wagoner were appraised in 1901, and all the rest in 1902, except the town of Boynton, which was appraised in 1905.”

The record shows that both Muskogee and Wagoner were appraised in 1900, and that in 1901 these same appraisals were adopted and approved as correct appraisals under the Creek Agreement (R. 32-33, 18-19).

est character to convince it that there was fraud or gross error in these valuations. It is a well settled principle of law that when fraud is alleged and a fiduciary relationship exists between the parties, the guardian, and not the ward, has the burden of proving the fairness of the transaction (Jones Commentaries on Evidence, 2nd Ed., Vol. 2, Sec. 549, pp. 1009-1012; 20 Am. Jur., par. 141, p. 146).

This Case Was Tried under Rule 39(a) of the Court of Claims.

This case was tried under Rule 39(a) of the Court of Claims, which reads as follows:

“In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. * * *

Under this rule the trial in the first instance is limited to the question of the general liability of the United States, and the question of the amount of recovery is left for further proceedings. The reason for this rule is evident; to save time and expense in the disposition of involved Indian cases.

In preparing this case under Rule 39(a), we presented evidence showing that the appraisals of the Creek town lots made by the Creek townsite commission were extremely low, as compared with appraisals for taxation made by town authorities less than six months after the appraisals by the Creek townsite commission; as compared with prices at which vacant and unimproved lots sold at public auction

within a year or less of the time of the appraisals by the Creek townsite commission; as compared with the reports on said values made by the United States School Superintendent for Indian Territory, some of which were made within a year or less of the time of appraisals by the Creek townsite commission; and as compared with the prices paid for the mere occupancy right of said town lots either before or about the time of appraisals by the Creek townsite commission. Practically all of the evidence showing that the appraisals by the Creek townsite commission were generally extremely low was secured from the Government's own records, and from the reports of the Government's own agents submitted years before the present controversy arose, and we believe that this general showing—that these appraisals were extremely low—would be sufficient to make out a case against the respondent for the purpose of determining the question of the liability of the Government under said Rule 39(a).

While the lower court, in Finding 9 (R. 8-9), does state that this evidence showed that the appraisals were low, yet the court further states that there was no showing that conditions were the same as at the time of appraisals by the Creek townsite commission. In this respect the petitioner believes that the proof of values as thus submitted by it was so close to the time of appraisal by the Creek townsite commission that a showing of a change of conditions was unnecessary. In fact, we believe that the burden of proving such a showing would be upon the respondent, and not upon the petitioner.

Therefore, we submit that the lower court erred in requiring of petitioner a showing of values of a meticulous nature, rather than determining the question of the liability of the respondent, for the purposes of a trial under Rule 39(a), upon a general showing that the appraisals by the Creek townsite commission were generally extremely low.

Conclusion.

We submit that the lower court has failed to apply to this case the applicable decisions of this Court governing the action of the United States in dealing with its dependent Indian ward. From the record it is evident that the conduct of respondent fell far short of exacting fiduciary standards.

For the reasons above set forth, we respectfully request that this Court grant a writ of certiorari to the petitioner in this case.

Respectfully submitted,

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
Attorneys for Petitioner.





APPENDIX.

Extract from deposition of J. George Wright, aged 81, taken on behalf of respondent at Washington, D. C., June 16, 1941 (Typewritten R. pp. 56-57, 59-63).

* * * * * *

2Q. What was your position at the time the townsites were surveyed, platted and appraised, the Creek townsites?

A. In 1898 I was assigned to the Indian Territory as Inspector in charge of the Five Civilized tribes, and was in that position when the town Commissioners were appointed.

3Q. You mean the Creek townsite Commissioners?

A. Yes, sir.

4Q. Do you remember the names of those Creek townsite Commissioners?

A. Tuttle, Adams and Marshall.

5Q. Do you recall what your duties were in connection with the appraisals of the Creek townsites?

A. They were made under my supervision, and a short time after that the question arose as to what extent that supervision would be, and I discussed it with the Secretary as to whether I was to supervise their appraisalment, or other work in ascertaining the appraisalment, and if I was expected to go in the field to check them up, to see whether those appraisalments were correct. I asked him if that was necessary. I told him that it would take up a great deal of my time.

6Q. You were speaking then to the Secretary of the Interior?

A. Yes. He told me he was not concerned with the methods of procedure that the Commission should take to ascertain their appraisalment, and it would not be necessary to give that supervision to check them up; check their appraisalment, and to go into the field to ascertain the methods of that work; that the law contemplated or provided that the Commissioners were to be the sole judges of the appraisalments; that the law provided that they should make their appraisalments without suggestion or supervision.

* * * * * *

20Q. Now, after the lots had been appraised and the appraisals listed on sheets of paper, what was done with them?

A. A schedule was submitted to my office and we checked with the plats, townsite plats, so that every lot was accounted for, and then they were forwarded to Washington, where there was no objection filed or any fraud indicated, that the townsite Commission had agreed on the appraisement and it had been approved by them.

By Mr. Niebell:

21Q. The Secretary then acted on those appraisals, did he?

A. Yes, sir.

By Mr. Stearns:

22Q. What was his action? Do you recall what he did?

A. He approved them.

23Q. And then what happened to the schedules?

A. They were sent back to our office, transferred over to the Indian Agent's office and sent to the Commissioners, in order that they could deliver those schedules to the persons who were entitled to them, and who paid the money in installment, as required in the Indian Agent's office. And, as I recall, when the payments were completed deeds were prepared for the signature of the Principal Chief of the Creek Nation. My recollection is, in sending these schedules up, I indicated that the appraisement seemed to be low compared with the prices paid for occupancy rights prior to appraisement.

24Q. Did that apply to all the towns?

A. I don't think we referred to it as schedules for all the towns.

25Q. In other words, it applied only to the town of Muskogee?

Mr. Weidemeyer: You had better ask him what towns it applied to.

26Q. (Continuing:) What towns did that statement apply to?

A. Well, that procedure was followed in every town. But I don't think I stated in every letter that it was an ap-

praisal low in comparison. I stated that in the first instance and, of course, that condition followed, the same in every town. But I have no recollection of so stating it.

.

Cross-examination.

By Mr. Niebell:

34XQ. I understand that in your conference with the Secretary of the Interior concerning the manner and method used by the townsite commissioners and your supervision of their work, that he instructed you not to go into the field and check up on the appraisal?

A. Yes, sir.

35XQ. In other words, when the schedule came in from the townsite commission you checked the schedule with the plat and then sent it on to Washington for approval?

A. Yes, sir.

.

37XQ. A good many of these towns, Mr. Wright, were old towns, were they not?

A. Yes, sir.

38XQ. They had been established for years?

A. Some of them.

39XQ. Was there or was there not any dealing in occupancy rights before the fee simple title could pass? That is, the possessory right?

A. Yes, sir.

.

41XQ. Do you recall of any specific instances where the occupancy right or the possessory rights were sold before the schedule of appraisal was made?

A. That was the general practice.

.

45XQ. If the possessory right was an article of value would it not represent somewhat the valuation of the lot?

A. The Department, in the first schedule that was sent up, I stated the price was low considering the possessory right which the land sold for, but notwithstanding the statement I made, the Department approved it, as recommended by me.

Extract from deposition of C. B. Lynch, taken on behalf of Defendant, taken at Tulsa, Oklahoma, on July 23, 1941. (Typewritten R. 152, 156-157).

Direct examination.

• • • • •

Q. Do you recall when oil was discovered near or around Tulsa?

A. It was right around about 1900. I know where the first well was, but I wouldn't be positive as to what date it was. It was over here at Red Fork.

• • • • •

Cross-examination.

• • • • •

By Mr. Stearns:

Q. Did you understand the previous question to mean that to your knowledge Mr. McBirney and the rest of these names just given to you, had been involved in the dummy scheduling of lots in Tulsa?

A. Not to my knowledge, no. I just heard that they were filling in people's names who didn't live here.

By Mr. Weidemeyer:

Q. In other words, you mean they were not bona fide occupants that they filed them in the name of?

A. Yes, I know that the Town Site Commission advised the filing those lots to friends of yours out of town, and I was a party to that myself with the other boys, and they called me out just before they left,—I was secretary—and they said you can't file that in the name of this corporation

or company. Well, I said, they bought those lots and paid for them, and that was before segregation, I believed, and then when the segregation came along, I filed them and they told me to change it and I changed some of them myself, there wasn't but a few of them, and then later there was a suit brought in Muskogee, which was tried before Judge Campbell, and we took our records down and his ruling I believe you will find if you will look it up, was that when the Creek Nation refunded the money we had paid for those lots, he would send the title back to the Creek Nation, but not until that time, and they never did do that. Now he said if you had left those lots filed in your company name, they could have held you, but he said, I will have to take them away from you when they pay you your money, but they never did pay it and the stuff stood over here and was sold for taxes and everything, and we never did make a nickel out of it.

Q. But the Town Site Commission advised you to file them——

A. They told me personally that, they said, you file this thing in the name of some party, for the reason we don't think you can file for a corporation, and I thought they were telling me right.

Extract from testimony of Lee Clinton, aged 64, taken on behalf of defendant at Tulsa, on July 23, 1941. (Type-written R. p. 141).

Cross-examination.

* * * * *

Q. I think you testified as to the oil at Red Fork and the discovery of it, what date was that?

A. Red Fork was June 25, 1901.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 711

THE CREEK NATION,

Petitioner,

v.

THE UNITED STATES.

**PETITIONER'S MOTION FOR LEAVE TO DISPENSE
WITH PRINTING PART OF THE RECORD PRIOR
TO DETERMINATION OF PETITION FOR WRIT
OF CERTIORARI.**

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States.*

Comes now the petitioner, the Creek Nation, and moves this Honorable Court for leave to dispense with the printing, prior to the determination of the petition for a writ of certiorari, of that part of the record which consists of the testimony of witnesses, pages 56 to 286, of that part of the

record certified by the Court of Claims and entitled "Stipulation as to 'other parts of the record as are material to the errors assigned' (Rule 99b)".

Respectfully submitted,

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
Counsel for Petitioner.

No objection.

CHARLES FAHY,
Solicitor General,
Per N. M. S.

(4704)





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ON THE

REVENUE



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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 711

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 9-14) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 14). A motion for a new trial was overruled October 5, 1942 (R. 14-15). The petition for a writ of certiorari was filed February 5, 1943, an extension of time having been granted (R. 77). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288).

QUESTIONS PRESENTED

1. Whether under the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288) this Court may review the record and hold that there is evidence to contradict the findings of fact made by the Court of Claims, or weigh the evidence and make findings of fact contrary to those made by that court.

2. Whether the action of the commissions selected to appraise lots in Creek townsites will be set aside and a revaluation made upon a showing of anything less than fraud or gross mistake.

3. Whether there is any evidence in the record showing a dereliction of duty on the part of the United States in valuing the town lots or establishing that they were appraised at other than their true value.

STATUTES INVOLVED

The pertinent part of Section 15 of the Curtis Act (Act of June 28, 1898, 30 Stat. 495, 500-501); Sections 10-15, inclusive, of the Act of March 1, 1901 (ratifying the original Creek Agreement), 31 Stat. 861, 864-866; and the Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288) are set forth in the Appendix, *infra*, pp. 14-23.

STATEMENT

Under authority of the Act of May 24, 1924, 43 Stat. 139, as amended, the Creek Nation filed its amended petition in the Court of Claims on

December 27, 1937, seeking to recover, with interest, the value of certain town lots alleged to have been improperly appraised and sold by the United States (R. 1-4). The findings of the Court of Claims (R. 5-9) may be summarized as follows:

Prior to the passage of the Curtis Act of June 28, 1898, 30 Stat. 495, all land which had been ceded by the United States to the Creek Nation was held in communal ownership. While the individual Indian might have an exclusive right of occupancy to particular land, he could not dispose of the fee. Individual Indians conveyed the occupancy rights in land to white persons who came into Indian territory. These white persons made considerable improvements on the land and as a consequence a number of towns had grown up. (R. 5.)

The Curtis Act provided for the allotment of certain parts of the Creek domain to the individual members of the tribe and for the sale of the remainder. Included in the land to be sold were the lots in the aforementioned towns. The Act provided for commissions, whose duty it was to appraise and sell the lots and who were to be composed of one member representing the tribe, one member appointed by the Secretary of the Interior, and one member representing the town. Commissions were appointed for the towns of Muskogee and Wagoner and they proceeded to appraise the lots in these towns. (R. 6.)

Before the lots so appraised were sold, the United States and the Creek Nation entered into the original Creek Agreement, ratified by Congress and approved by the President March 1, 1901 (31 Stat. 861). This agreement provided for commissions similar to those of the Curtis Act, except that the members were to be appointed by the Secretary of the Interior. One of the members was required to be a citizen of the tribe and to be nominated by its Principal Chief. Their duty was to survey, plat, appraise and sell the town lots. Upon the passage of this Act, the Secretary of the Interior appointed the same commissioners for the towns of Muskogee and Wagoner as had been chosen for those towns under the Curtis Act. (R. 6.) Their appraisals, made under authority of the Curtis Act, and approved by the Indian Inspector, the Commissioner of Indian Affairs and the Secretary of the Interior, were adopted, resubmitted, and again approved by the Secretary (R. 7-8). He later appointed commissioners for the other towns within the Creek territory (R. 7).

The commissioners, who were qualified to discharge the duties for which they were appointed (R. 7), exercised their best judgment as to the value of each of the lots (R. 8). In every instance the appraisals were unanimous and were approved by the Indian Inspector, the Commissioner of Indian Affairs, and the Secretary of the

Interior. Prior to the making of the appraisals, no lots had ever been sold and no market values established. (R. 8.) After the appraisals were made, deeds to the lots in the seventeen towns here involved (R. 7) were executed by the Principal Chief of the Creek Nation, and at that time no one complained that the appraisals were too low. The Creek Nation did complain (in a tribal act of October 12, 1904, and a memorial of October 19, 1906) that lots had been wrongfully scheduled—permitting purchase by those not so entitled.¹ An Act was consequently passed (34 Stat. 137, 144) authorizing the filing of suits to remedy this situation, and 231 suits were filed thereunder based on wrongful scheduling. (R. 8.)

No proof is in the record, other than the appraisals, from which the true values of the lots as of the date of the appraisals can be determined, and the proof does not show that the lots were not appraised at their true values (R. 9).

Upon these findings of fact the Court of Claims concluded, as a matter of law, that the Creek Nation was not entitled to recover (R. 9). Accordingly, judgment was entered dismissing the petition (R. 14).

¹ Lot occupants who had made permanent improvements were entitled, under Section 15 of the Curtis Act and Section 11 of the Act of 1901 (Appendix, *infra*, pp. 15, 20-21), to purchase the lots they occupied. A schedule of such occupants was made to determine who could properly purchase (see R. 8).

ARGUMENT

1. The Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288), provides for a review of the evidence by this Court where error is assigned to the effect that there is a "lack of substantial evidence to sustain a finding of fact." But petitioner seeks to have this Court review the record² and hold that there is evidence to *contradict* the findings of fact made by the lower court. For instance, in specification of error No. 4 (Pet. 22-23), petitioner alleges that the court below erred in holding that the evidence "was not sufficient to show fraud and gross undervaluation in the appraisal and disposal of Creek town lots." See also specifications of error Nos. 10, 13, 15 and 16 (Pet. 24-25). Petitioner also seeks, in effect, to have this Court weigh the evidence and make findings of fact contrary to those made by the court below. For example, in specification of error No. 12 (Pet. 24-25), complaint is made of lack of consideration given to Mr. Foulke's report by the court below. See also specifications of error Nos. 8 and 9 (Pet. 23-24). This is not an assertion of "a failure to make any finding of fact on a material issue" (28 U. S. C. 288) but an attempt to secure a hearing *de novo* in the hope that this Court, on an independent weighing of the evidence, will find in petitioner's favor. When there

² The major part of the Government's evidence was, on motion of petitioner (Pet. 53-54), not printed for the purpose of petitioning for certiorari. It consists of some 230 type-written pages.

is evidence which supports the findings (see pp. 9, 10, 12, *infra*), they will not be disturbed for lack of support, simply because there is other evidence which, if believed and accepted, would warrant contrary findings. *Lawson v. United States Mining Co.*, 207 U. S. 1, 12; *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, 11. Cf. *Alabama Power Co. v. Ickes*, 302 U. S. 464, 477. And where a negative finding of fact involves the weighing of evidence, it is as conclusive on appeal as an affirmative finding. *Nashville Interurban Ry. v. Barnum*, 212 Fed. 634, 639-640.

2. The Court of Claims based its decision on the ground that the Secretary of the Interior was obligated to act in good faith in the appointment of the commissioners; that they in turn were obligated to act in good faith in appraising the lots; and that only a showing of fraud or gross mistake would justify setting aside their action and cause a revaluation of the townsites by that court (R. 11). Such a holding is clearly correct. *Ross v. Stewart*, 227 U. S. 530, 535; *Johnson v. Riddle*, 240 U. S. 467, 474. And this is especially true when consideration is given to the fact that the happenings complained of took place many years ago and that a revaluation at the present time, as of then, is practically impossible.³ *United*

³ Even William D. Foulke, whose report is the principal "evidence" relied upon by petitioner to show low valuation, admits this impossibility (R. 38).

States v. Shrewsbury, 90 U. S. 508. Nor does the fact that the United States is a party to this suit prevent the application of these principles, for it has been held many times in such a case that in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties. *United States v. Chemical Foundation*, 272 U. S. 1, 14-15; *United States v. Nix*, 189 U. S. 199, 205; *United States v. Page*, 137 U. S. 673, 679-680; *Confiscation Cases*, 20 Wall. 92, 108. There is no evidence in this record negating the presumption of regularity and the lower court so held.

3. Petitioner defines the issue as being whether the United States has fulfilled its "agreement obligations" with the Creek Nation and whether in so doing it has measured up to exacting fiduciary standards (Pet. 28). It alleges a failure in this regard for four reasons: (1) the appointment of incompetent commissioners; (2) their "arbitrary" appraisals at less than "true value"; (3) the failure of the Secretary of the Interior to supervise the work of the commissioners; and (4) the approval of the appraisals with positive knowledge that they were extremely low and did not reflect the true value of the lots (Pet. 30). However, the Court of Claims has found to the contrary, and its findings are supported by abundant evidence. The record is replete with testimony that the commissioners were competent (Tr. 34, 35, 57, 77-78, 97, 208-209, 219, 225-226, 239-240,

252-254, 274-275),⁴ and that they did not act in an arbitrary manner in making their unanimous appraisals (Tr. 43, 44, 48-50, 52-53, 58-60, 81-82, 162-163, 226, 239-240).

The commissioners in making the appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on value (R. 61, 73-74). No way to evaluate the land better than the means actually used has been suggested. It must be remembered that the valuations were made not of lots that had a market value, since the fee could not be acquired until after passage of the Curtis Act (see Statement, *supra*, p. 3), but of lots as to the value of which differences of opinion would arise. "Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." *United States v. Miller*, No. 78, this Term decided January 4, 1943, pamphlet, p. 4. It is obvious (and the Court of Claims found) that the commissioners, who were competent, exercised their best judgment as to the value of each of the lots.

⁴ References are to the unprinted transcript which has been filed with the Clerk of this Court.

That the commissioners were properly supervised is apparent from the numerous letters of J. George Wright, Indian Inspector, to the Secretary of the Interior, appearing in the unprinted record (Tr. 32-36, 41-42, 48, 50, 51, 53-54; see also R. 68-69). These letters show an investigation of the conditions existing in the various towns which bear out the findings of the commissioners. The Secretary approved their appraisals, and there is nothing in the record to show that he acted arbitrarily or capriciously in so doing, or that he did not give the matter proper consideration.

Even if this Court were independently to weigh the evidence, petitioner has no competent proof in the record showing a dereliction of duty on the part of the United States in valuing the town lots in question or establishing that they were appraised at less than their true value.⁵

Petitioner, in contending that the lots were not appraised at their true values, places much reliance on statements contained in the report of William D. Foulke to the Secretary of the Interior. Foulke, as a consequence of the memorial of the Creek Nation of October 19, 1906 (R. 23; see Statement, *supra*, p. 5), apparently had been

⁵ It is not seen how it could be established that the lots were valued at less than their true value unless petitioner first proved that "true value." The fact that the case was tried under Rule 39 (a) of the Court of Claims, limiting the hearing in the first instance to "the issues of fact and law relating to the right of the plaintiff to recover," does not excuse petitioner from this showing. Unless it be made, his right to recover cannot be determined.

authorized by the Secretary of the Interior to investigate frauds in the scheduling^a of lots (R. 54), but he carried his investigations further and into the field of valuation (R. 25, 34). Whatever is said in his report on this latter subject cannot be considered as evidence since it was not within the scope of his authority. Even if it were, the report was not based upon the personal knowledge of Foulke nor was it made contemporaneously with the events mentioned therein, requisites for its admissibility. *United States v. Corwin*, 129 U. S. 381; *Brannen v. United States*, 20 Ct. Cls. 219. And it is evident from an examination of the report that it is biased and prejudiced and therefore not entitled to credence (see R. 23-24, 25, 26, 28, 29, 30, 31).

Petitioner points to evidence concerning appraisals for tax purposes by town authorities; reports of values of town lots made by the School Superintendent for Indian Territory; sales of lots at public auction; and sales of possessory rights to lots (Pet. 39-41). This evidence is clearly incompetent. As to the first three items there is no

^a Petitioner makes no distinction between "scheduling" and "appraising." This suit is limited to damages resulting from alleged undervaluation. If erroneous methods of "scheduling," *i. e.*, determining who owned the lots, were employed by the commissioners, that is of no moment here. Most of petitioner's evidence relates to "scheduling" and has nothing to do with undervaluation. Certainly, if frauds were practiced on the commissioners in connection with scheduling, that can have no bearing on whether fraud was committed by the commissioners in valuing the lots.

showing that conditions were then the same as at the time of the commission's appraisals. The contrary is true. At the time of the appraisals no improvements had been made in any of the towns and they were in a very crude state. Thereafter, a real estate boom developed with an attendant increase in values (R. 13, 63). Consequently, a valuation as of that time would have little, if any, bearing on "true value" at the time the commissions made their appraisals. Prices paid for possessory rights to lots would also furnish no indication of their true value. The record shows that such prices fluctuated enormously because of the element of speculation and because of personal factors not connected with the actual value of the land (R. 63-64).

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

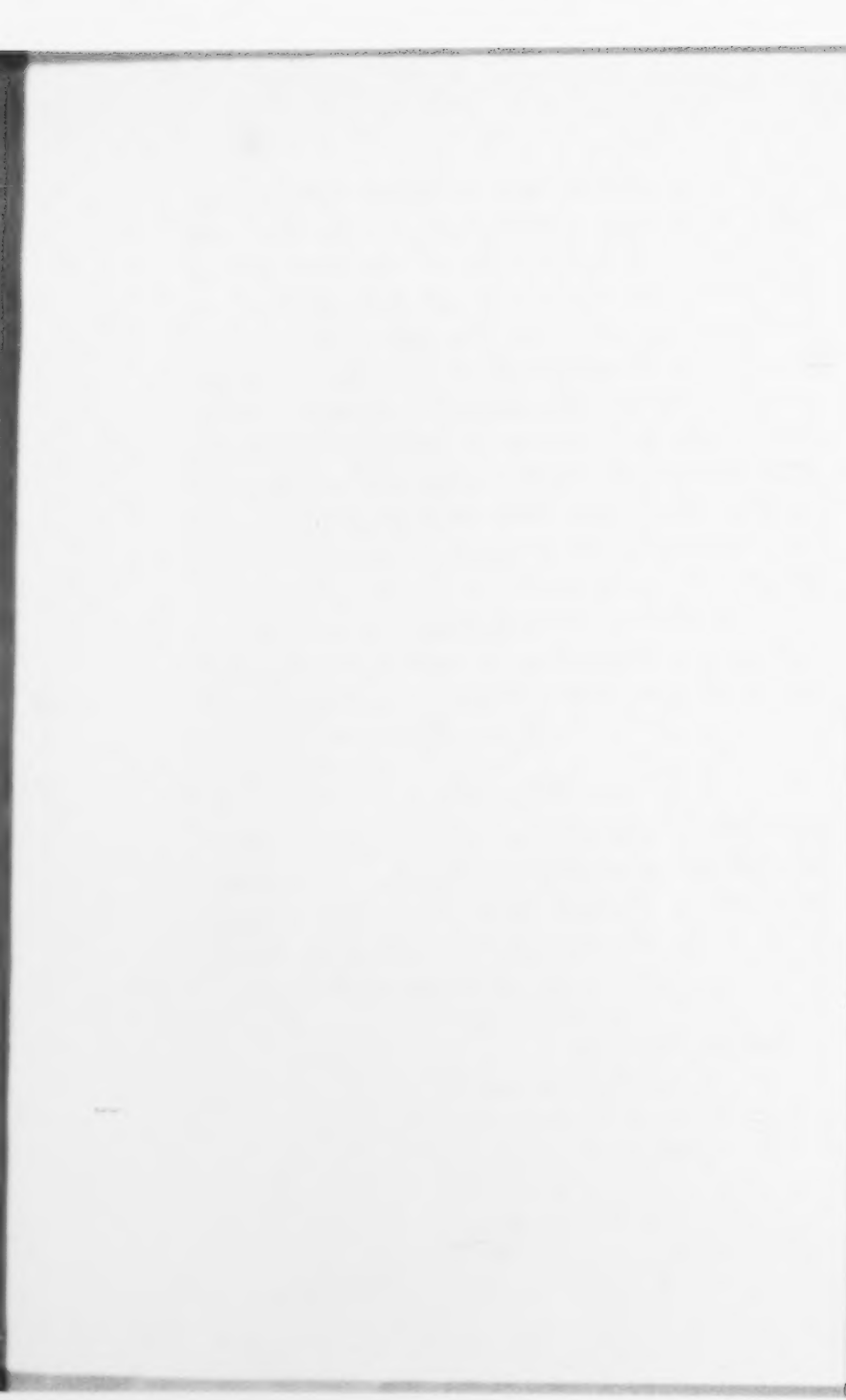
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APRIL 1943.





APPENDIX

Section 15 of the Curtis Act (Act of June 28, 1898, 30 Stat. 495, 500-501) provides in part:

SEC. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property, other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or the town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.

Said commissions shall cause to be surveyed and laid out townsites where towns with a present population of two hundred or more are located, conforming to the existing survey so far as may be, with proper and necessary streets, alleys, and public grounds, including parks and cemeteries, giving to each town such territory as may be required for its present needs and reasonable prospective growth; and shall prepare correct plats thereof, and file one with the Secretary of the Interior, one with the clerk of the United States court, one with the authorities of the tribe, and one with the town authorities. And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements there-

on; and no such appraisements shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot, said Secretary may fix the value thereof.

The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; ten per centum within two months and fifteen per centum more within six months after notice of appraisal, and the remainder in three equal annual installments thereafter, depositing with the Secretary of the Interior one receipt for each payment, and one with the authorities of the tribe, and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; and when the purchaser thereof has complied with the requirements herein for the purchase of improved lots he may, by petition, apply to the United States court within whose jurisdiction the town is located for condemnation and appraisal of such improvements, and petitioner shall, after judgment, deposit the value so fixed with the clerk of the court; and thereupon the defendant shall be required to accept same in full payment for his improvements or remove same from the lot within such time as may be fixed by the court.

All town lots not improved as aforesaid shall belong to the tribe, and shall be in

like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots.

Sections 10-15, inclusive, of the Act of March 1, 1901 (ratifying the original Creek Agreement), 31 Stat. 861, 864-866, provide:

10. All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised under the provisions of an Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May thirty-first, nineteen hundred, which said provisions are as follows:

"That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks, the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by compe-

tent surveyors, who shall prepare five copies of the plat of each town site which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

"Hereafter the work of the respective town site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the Act of June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior and not before.

"The Secretary of the Interior may in his discretion appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or

agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary.

"Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation a separate town-site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory.'

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

"As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such

Secretary, proceed to the disposition and sale of the lots in conformity with any then existing Act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

“The Secretary of the Interior may, for good cause, remove any member of any townsite commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

“It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such townsite limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the exterior limits of all townsites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

“Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands

in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time. Such townsites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other townsites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided*, That hereafter the Secretary of the Interior may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a townsite commissioner for any town or to fill any vacancy caused by the neglect or refusal of the townsite commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion appoint a commissioner to fill the vacancy thus created."

11. Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised value thereof, but if he shall fail within sixty days to purchase such lot and make

the first payment thereon, as herein provided, the lot and improvements shall be sold at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the purchase price to the owner of the improvements, less the appraised value of the lot.

12. Any person having the right of occupancy of a residence or business lot or both in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

13. Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

14. All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been

divided at two-thirds of their appraised value.

15. When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money in three equal annual installments, without interest.

Any person who may purchase an unimproved lot shall proceed to make payment for same in such time and manner as herein provided for the payment of sums due on improved lots, and if in any case any amount be not paid when due, it shall thereafter bear interest at the rate of ten per centum per annum until paid. The purchaser may in any case at any time make full payment for any town lot.

The Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288) provides:

That section 3, subsection b, of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, title 28, sec. 288 b), be amended so as to read as follows:

"(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like

effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

